CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 119.

MARY F. RAINEY, AS ADMINISTRATRIX OF THE ESTATE OF DAVID L. RAINEY, DECEASED,

vs.

W. R. GRACE & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED OCTOBER 18, 1911.

(22,913)

(22,913)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 22, 1913.

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2011.

MARY F. RAINEY, as Administratrix of the Estate of David L. Rainey, Deceased, Libelant and Appellant,

vs.

W. R. GRACE & COMPANY, a Corporation, Respondent and Appellee.

The appellant in this cause caused fifty or more copies of the apostles on the appeal to be printed under the first section of the Act of Congress approved February 13, 1911, entitled "An Act to Diminish the expense of proceedings on appeal and writ of error or of certiorari," 36 Stats. 901. The appeal was taken from the decision of the District Court of the United States for the Western District of Washington, Northern Division, in a cause in admiralty, and said copies of apostles were printed and indexed under the rule of that court which had been adopted on June 13, 1911, in pursuance of said act. In due time, and on August 7, 1911, the appellant filed in this court one of said printed copies of the apostles duly certified under the certificate and seal of the clerk of the court below, and thereafter, on September 11, 1911, the appellant filed in this court the following motion:

"Comes now the above named appellant and moves the court to hear and determine this cause on its merits without payment by appellant of the fees of the Clerk of this Court for indexing the record as prescribed and fixed by Section 9 of Rule 23 of this Court, for indexing the record and distributing copies thereof; and without

2 payment by appellant of the fees of the Clerk of this Court for indexing the record and distributing copies thereof as prescribed and fixed by Section 9 of Rule 23 of this Court."

Section 9 of rule 23 of this Court provides as follows:

"9. In all cases, including cases in which the record may have been printed under the Act of Congress approved February 13, 1911, or otherwise, the fee of the clerk of this Court for performing the services herein required shall be twenty-five cents for each printed page of the record and index, as provided by law."

Upon the foregoing statement, and in view of the fact that the same questions will arise in numerous appeals to this Court, which questions have been diversely answered in other United States Circuit Courts of Appeals, this Court being in doubt desires the instruction of the Supreme Court upon the following questions which it certifies for its decision:

1. When the appellant in a cause in admiralty causes to be printed and presented to this Court under said Act of February 13, 1911, printed copies of the apostles on appeal, each of which copies contains a printed index of the contents thereof and is prepared and

printed under a rule of the lower Court adopted in pursuance of said Act, is this Court authorized to hear and determine the cause on such copies and to dispense with the requirement of the payment of fees to the Clerk of this Court by the appellant as prescribed by Section 9 of Rule 23 of this Court, which is the fee bill prescribed on February 28, 1898, by the Supreme Court under the Act of Congress of February 19, 1897, 29 Stats. 537, which provides as a fee for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, twenty-five cents"?

2. Does the first section of the Act of Congress of February
3 13, 1911, 36 Stats. 901, set aside by implication said fee bill so prescribed by the Supreme Court which is referred to in the first question herein certified?

Dated this 9th day of October, 1911.

WM. B. GILBERT,
ERSKINE M. ROSS,
WM. W. MORROW,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit. Under Section 6 of the Act of March 3, 1891, Certifying Certain Questions to the Supreme Court of the United States. Filed October 9, 1911. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true and correct copy of "Certificate of United States Circuit Court of Appeals for the Ninth Circuit, Under Section 6 of the Act of March 3, 1891, Certifying Certain Questions to the Supreme Court of the United States," this day filed in the cause entitled Mary F. Rainey, as Administratrix etc, Appellant, vs. W. R. Grace & Company, a Corporation, Appellee, No. 2011, as the original of said certificate remains on file and of record in my office.

Attest my hand and the seal of said Circuit Court of Appeals at San Francisco, California, this ninth day of October A. D. 1911.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Endorsed:] Form No. 507. No. 2011. In the United States Circuit Court of Appeals for the Ninth Circuit. Mary F. Rainey, etc., v. W. R. Grace & Company, a Corporation. Certified copy of certificate of U. S. Circuit Court of Appeals for the Ninth Circuit, under section 6 of the Act of March 3, 1891, certifying certain questions to the Supreme Court of the United States.

Endorsed on cover: File No. 22,913. U. S. Circuit Court Appeals, 9th Circuit. Term No. 119. Mary F. Rainey, as administratrix of the estate of David L. Rainey, deceased, vs. W. R. Grace & Company. (Certificate.) Filed October 18th, 1911. File No. 22,913.

No. 119

In the Supreme Court of the United States

October Term, 1913.

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BRIEF OF MARY F. RAINEY, AS ADMINISTRATRIX OF THE ESTATE OF DAVID L. RAINEY, DECEASED.

STATEMENT OF CASE.

The appeal in this case was taken from the decree of the District Court of the United States for the Western District of Washington, Northern Division, in a cause of admiralty, and fifty or more copies of apostles on appeal, indexed under Admiralty Rule 52 *of this Court*, were printed, as prepared and indexed, under the Rule of the District Court which had been adopted on June 23, 1911,

in pursuance of Act of Congress approved February 13, 1911.

In due time, and on August 7, 1911, the appellant filed in the United States Circuit Court of Appeals for the Ninth Circuit said printed copies of the apostles, one of which was duly certified under the certificate of the clerk and seal of the court below; and thereafter on September 11, 1911, appellant duly moved the Circuit Court of Appeals, to hear and determine said cause on its merits without payment by the appellant of the fees of the clerk of said Circuit Court of Appeals for indexing the record as prescribed and fixed by amended Section 9 of Rule 23 of the Circuit Court of Appeals for indexing the record and distributing copies thereof. Amendment adopted May 23, 1911.

Pending the determination of said motion, the Circuit Court of Appeals desiring the instructions of this court, for reason in its certificate assigned, upon the following questions, certified the same to this court for its decision:

1. When the appellant in a cause in admiralty causes to be printed and presented to this court under said Act of February 13, 1911, printed copies of the apostles on appeal, each of which copies contains a printed index of the contents thereof and

is prepared and printed under a rule of the lower court adopted in pursuance of said Act, is this court authorized to hear and determine the cause on such copies and to dispense with the requirement of the payment of fees to the clerk of this court by the appellant as prescribed by Section 9 of Rule 23 of this court, which is the fee bill prescribed on February 28, 1898, by the Supreme Court under the Act of Congress of February 19, 1897, 25 Stats. 537, which provides as a fee for "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, twenty-five cents"?

2. Does the first section of the Act of Congress of February 13, 1911, 36 Stats. 901, set aside by implication said fee bill so prescribed by the Supreme Court which is referred to in the first question herein certified?

ARGUMENT.

Prior to the creation of the United States Circuit Courts of Appeals, the appeal from final decrees in admiralty causes was from the District Court to the Circuit Court.

Admiralty Rule 52 of the Supreme Court provided (Sec. 1 of that Rule) that the clerk of the District Court should make up the records to be transmitted on such appeals and what such records should contain and (Sec. 2 of that Rule) that the clerk of the District Court (a) should page the copy of the record on such appeal, and (b) should make an index thereto, and (c) should certify the entire document at the end thereof, under seal, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule.

That record was usually written or typewritten.

When in 1891 the Circuit Courts of Appeals were created and established, it was provided (Section 11, Act of March 3, 1891,) that

> "all provisions of the law now in force regulating the methods and systems of review through appeals and writs of error shall regu-

late the methods and systems of appeals and writs of error provided for in this act."

and (Sec. 2) that the court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

Under the provisions of Sec. 2 of Act March 3, 1891, the Circuit Courts of Appeals provided by rule (Rule 23) for the filing of a printed record.

Even where the clerk of the District Court in preparing the record on appeal, under General Admiralty Rule 52, made an index thereto, when the record came to be printed new paging had to be given to the index of the printed page.

In the Ninth Circuit the Circuit Court of Appeals required by its Rule 23 that all records should be printed under the supervision of the clerk.

Under the provisions of Sec. 2 of the Act of March 3, 1891, the costs and fees in the Supreme Court at that time provided by law, were to be the costs and fees in the Circuit Court of Appeals.

The costs and fees in the Supreme Court on March 3, 1891, were *inter alia,*

"for preparing the record or a transcript thereof for the printer, indexing the same,

supervising the printing and distributing the printed copies, fifteen cents per folio."

On Feb. 19, 1897, an amendment to the Act of March 3, 1891, was enacted providing that the clause in Sec. 2 of the latter act reading,

> "the costs and fees in the Supreme Court now provided by law shall be costs and fees in the Circuit Court of Appeals,"

should read:

> "The costs and fees in each Circuit Court of Appeal shall be fixed and established by said court in a table of fees, to be adopted within three months after the passage of this act: Provided, That the costs and fees so fixed by any Court of Appeals shall not, with respect to any item, exceed the costs and fees now charged in the Supreme Court."

And the Act of Feb. 19, 1897, further provided:

> "Each Circuit Court of Appeals shall, within three months after the fixing and establishing of costs and fees as aforesaid, transmit said table to the Chief Justice of the United States, and within one year thereof the Supreme Court of the United States shall revise said table, making the same, so far as may seem

> just and reasonable, uniform throughout the United States. The table of fees, when so revised, shall thereupon be in force for each circuit."

Pursuant to Act of Feb. 19, 1897, the Supreme Court, by order entered January 10, 1898, established a table of fees and costs in the Circuit Courts of Appeals; and thereafter, by order entered Feb. 28, 1898, amended the table established by order of January 10, 1898, to take effect March 1, 1898, so that on and since March 1, 1898, the table of fees and costs fixed by law for the Circuit Courts of Appeals have provided, *inter alia*, that the fee of the clerk of the Circuit Courts of Appeals

> "for preparing the record for the printer, indexing the same, supervising the copies, for each printed page of the record and index, $0.25."

Subsequently Congress passed an Act, approved February 13, 1911, entitled "An Act to Diminish the Expense of Proceedings on Appeal and Writs of Error or of Certiorari" wherein it was provided that the appellant or plaintiff in error should cause to be printed under rules to be prescribed by the lower court, and should file in the office of the clerk

of the Circuit Courts of Appeals printed transcripts of the record, in such form as the Supreme Court shall by rule prescribe.

The requirements of General Admiralty Rule 52 have not been changed or modified either by statute or by order of the Supreme Court.

The record on appeal then which is required to be printed under the Act of February 13, 1911, in admiralty causes, is the record prescribed by Admiralty Rule 52, and must include an index thereto.

By force of the Act of February 13, 1911, so much of the table of fees and costs established by order of the Supreme Court under the Act of February 19, 1897, as conflicts with the provisions of February 13, 1911, must be held for naught.

The power of all the federal courts to fix the fees and costs to be charged, is derived from Congress and the last word by Congress must prevail over a prior exercise by the courts of a power conferred by Congress where there is conflict between a fee so fixed by the court by the exercise of that power and a subsequent congressional enactment.

That such conflict does exist between the Act of February 13, 1911, and the table of fees established by order of the Supreme Court of February 28,

1898, will hardly be disputed. The Circuit Court of Appeals for the Ninth Circuit recognized that conflict when it promulgated its order of May 23, 1911, amending Sections 4 and 9 of its Rule 23.

While that table of fees fixed a fee of 25 cents a page for each printed page of the record and index, for "preparing the record for the printer, indexing the same, supervising the printing and distributing the copies," under the Act of February 13, 1911, the printing is now done under rules prescribed by the court below.

In the Western District of Washington the District Court has, under the Act of February 13, 1911, prescribed a rule for the printing of the record.

The record in this cause has been printed under the provisions of the Act of February 13, 1911, the rules of the District Court for the Western District of Washington, and in form as prescribed by the Supreme Court, and complies with the requirements of General Admiralty Rule 52, particularly in that it is paged and contains an index thereto, and that the entire document "at the end thereof" is certified by the clerk of the District Court to be a transcript of the record of that court.

Since the enactment of the Act of February 13, 1911, the Circuit Court of Appeals for the Ninth Circuit has, by order entered May 23, 1911, amended its Rule 23, Section 4 thereof, as follows:

> "4. In all cases including cases in which the record may have been printed under the Act of Congress approved February 13, 1911, or otherwise the clerk of this court shall index the printed record, and distribute the printed copies to the judges and the reporter and one or more printed copies to the counsel for the respective parties."

This is to require of the clerk of the Circuit Court of Appeals for the Ninth Circuit, in admiralty causes, a service which duplicates work already performed under the law.

The clerk of the Circuit Court of Appeals for the Ninth Circuit is required to print an index to the record in the case at bar, when, under the statute and Admiralty Rule 52, and Section 6, Rule 14, of the Circuit Court of Appeals for the Ninth Circuit, the record, already at the time of its filing with the clerk of the Circuit Court of Appeals for the Ninth Circuit, contains an index.

Section 6, Rule 14, *supra,* provides that "the record in cases of admiralty jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court."

To compensate the clerk of the Circuit Court of Appeals for the Ninth Circuit for the work thus required of him by the amendment to Sec. 4, Rule 23, adopted May 23, 1911, the Circuit Court of Appeals for the Ninth Circuit, since the enactment of the Act of February 13, 1911, has, by order entered May 23, 1911, further amended its Rule 23, Sec. 9 thereof, as follows:

> "9. In all cases, including cases in which the record may have been printed under the Act of Congress approved February 13, 1911, or otherwise, the fee of the clerk of this court for performing the services herein required shall be twenty-five cents for each printed page of the record and index as provided by law."

We submit

First—That there is no statute conferring power on the Circuit Court of Appeals for the Ninth Circuit either

(a) to fix any of the fees and costs of the clerk of the Circuit Court of Appeals for the Ninth Circuit, or,

(b) to revise, amend, alter or change the table of fees established by order of the Supreme Court under the provisions of the Act of February 19, 1897.

Second—That any order of the Circuit Court of Appeals for the Ninth Circuit fixing any such fees and costs or revising, amending, altering or changing the table of fees established by order of the Supreme Court, under provisions of Act of February 19, 1897, is without force of law; that appellant is not in any way bound thereby and that any demand thereunder by the clerk of the Circuit Court of Appeals for the Ninth Circuit is without authority of law.

Third—That, assuming power in the Circuit Court of Appeals for the Ninth Circuit to fix the fees or to change the table of fees established by the Supreme Court, where the fee is to compensate for services required of the clerk of the Circuit Court of Appeals for the Ninth Circuit, which duplicate the work already required by law of others, we submit that the imposition of such fee for such duplicate work is contrary to common sense and repugnant to a sense of justice.

In *Colt's Patent Firearms M. Co. et al. vs. N. Y. Sporting Goods Co.*, 186 Fed. 625, the Circuit Court

of Appeals for the Second Circuit, in considering the effect of the Act of February 13, 1911, hold, upon the strength of *Bean vs. Patterson,* 110 U. S. 401, that where the fee charged is one amount for several acts of service, the fee is "indivisible" and, in view of the plain intention of Congress (Act of February 13, 1911) that the fees on appeal in the federal courts should be reduced, that the clerk must receive the full amount of the fee and hold it as a special deposit until the proper authority shall have distributed the indivisible fee prescribed by the Supreme Court fee bill.

But the case of *Bean vs. Patterson, supra,* was one where the litigant had voluntarily furnished a record in print where the rule required the clerk of the Supreme Court to print it. The litigant voluntarily performed a service which it was the prerogative of the clerk to perform and charge for.

The case at bar is different in this that appellant is not voluntarily performing some steps in this appeal which the law requires the clerk of the Circuit Court of Appeals for the Ninth Circuit to perform and for the performance of which it allows him compensation.

The step in this appeal for which the clerk of the Circuit Court of Appeals for the Ninth Circuit

is demanding compensation, under Sec. 9 of Rule 23, as amended, is for indexing and distributing the record required of him under Sec. 4 of Rule 23, as amended.

The appellant has already filed an indexed record, as required by law, prepared by the clerk of the lower court under the law, for which the latter was entitled to compensation under the law and which the appellant was not entitled to until she had paid the fees provided by law for that record so indexed.

By the Act of February 13, 1911, the duties of the clerk of the Circuit Court of Appeals for the Ninth Circuit, in *admiralty causes*, in (a) *preparing the record for the printer*, (b) *indexing the record*, and (c) *supervising the printing*—all duties formerly required of that clerk—are abolished. He is no longer required to perform those services; other officers of the law are required to perform them and are allowed compensation by law for such performance.

This leaves the only duty of that clerk with respect to the record after filing,

to distribute the copies.

No fee is fixed by law for the discharge of this duty and until Congress or some court pursuant to

act of Congress prescribes the fee for *distributing copies* that duty must be performed by the clerk without compensation.

A clerk of a court is entitled to such compensation only as is specifically provided by statute; he takes his office *cum onere* and must perform gratuitously those official duties for which no compensation is provided by law.

7 *Cyc.* 206.

The Circuit Court of Appeals for the Ninth Circuit has said, in *Pac. Mail S. S. Co. vs. Iverson et al.*, 154 Fed. 450, that the court has no power to allow costs other than statutory costs, except in cases where expenses have been incurred in the conduct of the case under the order of the court.

This rule applies as much to the fees of the clerk of the Circuit Court of Appeals for the Ninth Circuit as to any other item of costs.

Until Congress or some court by authority of Congress shall fix the fee of the clerk for the service of *distributing the copies* of the record, in *admiralty causes*, he must discharge that duty without compensation.

If the Circuit Court of Appeals for the Ninth Circuit had power to change the table of fees estab-

lished by the Supreme Court, it had and now has the power to fix such fees in admiralty causes as compensation for service actually required, work actually performed by its clerk—and not required and performed by other officers of the law, under the law.

The Circuit Court of Appeals for the Second Circuit, in *Colt's etc. Co. vs. N. Y. etc. Co.*, 186 Fed. 625, which was a suit in equity, on motion of appellants to be relieved from payment of clerk's supervision fee, says:

> "It would seem that, when the only thing which the clerk does is to prepare or supervise the preparation of the index, the only fee charged should be 25 cents for each page of such index. But in *Bean vs. Patterson*, 110 U. S. 401, it was held that the fee was indivisible, and that the whole amount must be charged if any part of the work is done. Under this decision it would not be safe for the clerk to collect merely the fee per page of index. No regulation of this court would relieve him from the obligation to account to the Treasury Department for the full amount. It is, however, so plainly the intention of Congress that these fees should be reduced that the proper course

would seem to be for the clerk to receive the full amount of fees now, and hold them as a special deposit until the proper authority shall have distributed the 'indivisible fee' prescribed by the Supreme Court fee bill."

The Circuit Court of Appeals for the Sixth Circuit, in *Smith vs. Farbenfabricken etc. Co.*, 197 Fed. 894, which was a suit in equity, upon a motion to dispense with the clerk's supervision fee, says:

"Several questions have arisen regarding the application of the Act of February 13, 1911, * * * in connection with rule 23 of this court, requiring the clerk to prepare an index and supervise the printing of the record and in connection with the table of fees (150 Fed. cxxxix) providing a fee of 25 cents a page therefor. Our rulings on these matters have been without opinion, and it seems proper to state them in connection with the present motion.

"In an oral opinion by Judge Severens, we expressed our unwillingness to adopt the practice of the Second Circuit announced in *Colts, etc. Co. vs. N. Y. etc. Co.*, 186 Fed. 625, and we held that the statute should be construed as

intending to abolish the clerk's supervision fee and was broad enough to accomplish that result in the cases to which it applied."

We submit that each of the questions certified to this court should be answered by this court in the affirmative.

WILLIAM H. GORHAM,
Proctor for Mary F. Rainey,
Administratrix of the Estate
of David L. Rainey, Deceased.

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 119.

MARY F. RAINEY, as Administratrix of the Estate of DAVID L. RAINEY, Deceased,

vs.

W. R. GRACE & COMPANY.

On a Certificate from The United States Circuit Court of Appeals for the Ninth Circuit.

Memorandum Submitted by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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LIST OF STATUTES.

RULES.

Copies of the Rules of the Circuit Court of Appeals have been furnished to the Clerk of this Court for reference, if needed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 119.

MARY F. RAINEY, Administratrix, etc.,

vs.

W. R. GRACE & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Memorandum Submitted by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

The Clerk of the Circuit Court of Appeals for the Ninth Circuit most respectfully submits the following points in reply to the brief for Mary F. Rainey (the appellant in the Circuit Court of Appeals, and, for brevity, herein referred to as the appellant):

I.

THE ACT OF FEBRUARY 13, 1911—ITS SCOPE AND SOLE PURPOSE.

It is submitted that the interpretation of the act of February 13, 1911 (36 Stat. 901), contended for by the appellant is contrary to the meaning of the statute as clearly expressed by Congress.

As declared in its title, the sole purpose of the act is "to diminish the *expense* of proceedings on appeal and writ of error or of *certiorari*,"—(not to abolish legitimate fees and costs),—and that purpose is mainly to be accomplished in three ways:

First (under section 1 of the act):

By allowing the appellant or plaintiff in error *to prepare and cause the record to be printed, wherever and by whomsoever he desires,* and to use such printed record, in lieu of the expensive certified *typewritten* record formerly required

in the prosecution of the case to the appellate courts, thus "*diminishing the expense*" of appellate procedure by obviating the necessity for the certified *typewritten* record theretofore required, and thereby saving the *expense* of the preparation and certification of the same. That this was the intent of Congress is expressed in the last clause of section 1 of the act, which provides that "*no written or typewritten* transcript of the record shall be required."

Second (under sections 1 and 2 of the act):

By allowing the appellant or plaintiff in error to file and lodge a sufficient number of copies of such printed record in the Circuit Court of Appeals for use both on the hearing there and in the Supreme Court of the United States, thereby saving the expense of reprinting the record in the latter court.

And Third: By the provision in section 2 of the act which denies the clerk of the Circuit Court of Appeals any fee for the preparation of the record on appeal to, or on writ of error or of *certiorari* from, the Supreme Court in so far as concerns that part of the record as had already been printed and lodged with him.

II.

THE ACT OF FEBRUARY 13, 1911—ABSENCE OF INTENTION OF CONGRESS TO REPEAL EXISTING LAW AND DECISIONS AGAINST REPEAL BY IMPLICATION.

The act of February 13, 1911, contains no repealing clause, nor a single word even remotely suggesting that it was the intention of Congress to repeal the Table of Fees and Costs prescribed by this Court for clerks of the Circuit Courts of Appeals, or any of the items thereof. Undoubtedly, if Congress had intended such repeal, provision would have been made accordingly.

The well-settled rule against the repeal of statutes by implication has been repeatedly announced by this Court, and for the convenience of the Court, the following extracts from decisions on this point are briefly quoted:

In Petri v. Creelman Lumber Co. (199 U. S. 487, 497), the Court, speaking through Mr. Chief Justice White, held:

> *"It is elementary that repeals by implication are not favored, and that a repeal will not be implied, unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation."*

In Ex parte United States (226 U. S. 420, 424), the Court, speaking through Mr. Chief Justice White, again held:

> *"When the issue is thus narrowed solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be expressed or the implication to that end be irresistible. Petri v. Creelman Lumber Co., 199 U. S. 487, 497."*

It is here worthy of note that the act granting this Court power to prescribe the Table of Fees for clerks of Circuit Courts of Appeals is special, whereas, the act of February 13 is general in its nature.

In Wilmot v. Mudge (103 U. S. 217, 221), the Court, speaking through Mr. Justice Miller, held:

> "As regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted."

In Cope v. Cope (137 U. S. 682, 686), the Court, speaking through Mr. Justice Brown, held:

> "Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable

construction. McCool v. Smith, 1 Black, 459; Bowen v. Lease, 5 Hill, 221; Ex parte Yerger, 8 Wall. 85, 105; Furman v. Nichol, 8 Wall. 44; United States v. Sixty-seven Packages, 17 How. 85; Red Rock v. Henry, 106 U. S. 596."

In Frost v. Wenie (157 U. S. 46, 58), the Court, speaking through Mr. Justice Harlan, held:

> "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute. McCool v. Smith, 1 Black, 459, 468; United States v. Tynen, 11 Wall. 88, 93; Red Rock v. Henry, 106 U. S. 596, 601; Henderson's Tobacco, 11 Wall. 652; King v. Cornell, 106 U. S. 395, 396."

In United States v. Healey (160 U. S. 136, 146), the Court, speaking through Mr. Justice Harlan, again held:

> "As the statute last enacted contains no words of repeal, and as repeals of statutes by implication merely are never favored, our duty is to give effect to both the old and new statute, if that can be done consistently with the words employed by Congress in each."

In Osborn v. Nicholson (80 U. S. 654, 662), the Court, speaking through Mr. Justice Swayne, held:

> "The doctrine of the repeal of statutes and the destruction of vested rights by implication are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs."

III.

THE FEE IN QUESTION IS EXPRESSLY PROVIDED BY LAW, IS "INDIVISIBLE," AND MUST BE COLLECTED AND ACCOUNTED FOR BY THE CLERK.

The fee complained of is expressly fixed by the eleventh item of the Table of Fees and Costs (169 U. S. 740), established by this Court on February 28, 1898, for the Circuit Courts of Appeals pursuant to the act of Congress approved February 19, 1897 (29 Stat. 536) and is as follows:

> "Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index..... ....$0.25."

In Bean v. Patterson (110 U. S. 401), this Court, speaking through Mr. Chief Justice Waite, held that the fee just quoted is *"indivisible and if the clerk performs any part of the service is entitled to collect for the whole fee."*

Printing rule 23 of the Circuit Court of Appeals for the Ninth Circuit, section 9 of which does not pretend to create, but simply embodies the fee in question, is based upon the provisions of the act approved February 19, 1897 (29 Stat. 536); and the order of this Court entered February 28, 1898, *prescribing the fee,* as well as upon the following provision in section 2 of the act of March 3, 1891 (26 Stat. 826), creating the Circuit Courts of Appeals:

> "The Court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

The Table of Fees and Costs prescribed by this court is expressed in clear and unambiguous language. No class of cases is excepted from its operation and the fee in question applies to all classes of causes, *including causes in admiralty.*

The act of February 13, 1911, does not relieve the Clerk from the duty of collecting and accounting for all fees and costs expressly provided by law.

This Court has prescribed the fee and printing rule 23 of the Circuit Court of Appeals for the Ninth Circuit provides

for the printing of the record under the supervision of the Clerk, and requires him to prepare an index thereto, and to distribute copies thereof, etc. As already shown, this rule was adopted in pursuance of law, and it is *the only rule authorized by law* governing the procedure relative to the printing of records in the Circuit Court of Appeals. The act of February 13, 1911, does not provide that the Clerk of the *District Court* shall prepare the record for the printer, or that he shall index the same, or that he shall supervise the printing and distribute the copies. These services are all specifically provided for, as already indicated, *only* in the Table of Fees prescribed by this Court and read into the rules or adopted by the Circuit Court of Appeals.

In United States v. Shields (153 U. S. 88, 91), this Court, speaking through Mr. Justice Jackson, held:

> "Fees allowed to public officers are matters of strict law depending upon the very provisions of the statute. They are not open to equitable construction by the courts nor to any discretionary action on the part of the officials."

By the act of Congress approved June 6, 1900 (31 Stat. 639, 640), and the decisions of the Comptroller of the Treasury (Vol. 18, Comp. Dec. 483), the Clerk of the Circuit Court of Appeals is required to collect the fee in question and account to the Government therefor. The Clerk has collected and accounted for the fee accordingly in all cases excepting the case at bar.

It is confidently submitted that in Bean v. Patterson (110 U. S. 401), this Court, speaking through Mr. Chief Justice Waite, decided this case in favor of the clerk when it held that:

> "The clerk is responsible to the Court for the correctness and proper indexing of the printed copies of the record, for their presentation to the justices in the form and of the size prescribed by the rules, and for their delivery when required to the parties entitled thereto. As he must now account to the Treasury for the fees and emoluments of his office, he may demand

payment in advance. Steever v. Rickman, 109 U. S. 74. If the printing is actually done under his supervision he may require the payment of the fee chargeable under the rule before the printing is done. If the parties themselves furnish the printed copies, the fee must be paid, if demanded, in time to enable him to make the necessary examinations and be ready to deliver the copies to the parties or their counsel and to the Court when needed for any purpose in the progress of the cause. The fee is for the services specified in this item of the table, and is indivisible. Consequently, if the clerk performs any part of the services he is entitled to collect the whole fee; and if the printed record is used at all, it must be examined by him to see if it conforms to the copy certified below and on file as to the transcript of the record. So that if the printed copies are used for any purpose in the progress of the cause the whole fee is chargeable. As the law now stands the fees and emoluments of the office belong to the Government, subject only to the payment of the annual salary of the clerk, necessary clerk hire, and incidental expenses, and the clerk is the collecting agent for the Government.

"As this record has been printed the case may be docketed without security for this fee, but the printed copies cannot be delivered to the justices or the parties for use on the final hearing or on any motion in the progress of the cause unless the fee is paid when demanded by the clerk in time to enable him to make his examinations and perform his other duties in connection with the copies."

The Comptroller of the Treasury to whom all clerks look with favor, (XVIII Comp. Dec. 483), construing the act of February 13, 1911, held:

"It has been held that a similar fee provided for the Clerks of the Supreme Court is indivisible and that when the clerk renders any part of the service for which it is provided, as for instance, the indexing of the record or the distributing of the copies, he is entitled to the fee and must account therefor, although the record may have

been printed by another, and the requisite number of printed copies delivered to the clerk. (Bean v. Patterson, 110 U. S. 401.)

"The act of February 13, 1911 (36 Stat. 901), provides that the appellant or plaintiff in error shall cause the record to be printed and shall file the requisite number of printed copies, one of which must be certified by the clerk of the court below, with the clerk of the appellate court, thus relieving that officer of the duty of preparing the record for the printer, and supervising the printing, and also of responsibility for the correctness of the printed copies. But he is still charged with the duty of indexing the record and distributing the copies, and under the rulings cited above, he is as much entitled to this fee as if the record had been prepared by him and printed under his supervision, and it seems to have been so held by the Circuit Court of Appeals for the Second Circuit in Colt's Patent Firearms Mfg. Co. et al. v. New York Sporting Goods Co. (186 Fed. Rep. 625), though the Court, because of the evident intention of Congress to reduce the costs of appeals, held the matter in abeyance, by directing that a special deposit to cover such fees shall be taken and held by the clerk until this 'indivisible fee' shall have been distributed by proper authority.

"*The act of 1911, supra, leaves the fees of clerks of Circuit Courts of Appeals for their services in connection with the printing of records to be collected and accounted for in the same manner as before that act was passed,* and I have held that the reduction of expense contemplated by the statute was effected by taking from the clerk of the lower court his fee for making the transcript. (Decision of Nov. 11, 1911, in Maynard's case.)"

IV.

THE SERVICES RENDERED BY THE CLERK UNDER THE LAW AND RULES.

On page 16 of the appellant's brief the statement is made, in substance, that in the present case "the only duty of the

clerk with respect to the record after filing [in the Circuit Court of Appeals is] to distribute the copies" of the record.

This statement is not justified either by the facts or the law, because, in addition to "indexing" the record and "supervising the printing" of the index of a record printed by the parties below,—(or in addition to carefully verifying the index, if already printed; which verification is equivalent to an indexing of the record),—the Clerk of the Circuit Court of Appeals is required to carefully examine the printed record, from cover to cover, to ascertain whether or not the same complies with rule 26 and the practice in the Circuit Court of Appeals, and, furthermore, he is required by rule and practice to distribute copies of the printed record to the Judges, the reporter, and to the additional counsel appearing for the respective parties in the Appellate Court; to preserve such extra copies of the printed record as may be lodged with him for future use in the Supreme Court; and, frequently, to prepare for the printer, to index, and supervise the printing of, and to distribute printed supplemental records, addenda, etc.

From what has been said in this connection, it is plain that, although records be printed by the parties in the trial courts, the Clerk of the Circuit Court of Appeals would, nevertheless, perform all of the services described by the Table of Fees and Costs prescribed by this Court, and by Printing Rule 23 of the Circuit Court of Appeals, viz.:

(1) "Preparing the record for the printer" (viz.: indexes, supplemental records, addenda, records in interlocutory and bankruptcy cases, and in cases of original jurisdiction);

(2) "Indexing the same";

(3) "Supervising the printing";

(4) "Distributing the copies to the Judges, the reporter, and to counsel";

And, in addition,

(5) Preserving extra copies of the printed record for future use in the Supreme Court.

THE IMPORTANCE OF REQUIRING THE INDEXING OF ALL RECORDS IN THE APPELLATE COURTS.

In regard to the indexing of records, the important fact will be borne in mind that, in recently amending section 4 of rule 23 of the Circuit Court of Appeals, the portion of the section as amended requiring the Clerk "in all cases" to "index the printed record" was adopted advisedly. The preparation and printing of comprehensive indexes involves the careful examination and consideration of each and every page of the record, exhibits, etc., and constitutes a very important, technical feature incident to the printing of records. The "indexes" prepared in the many different Districts in the Ninth Circuit necessarily differ greatly in character and style and are usually far from being complete, frequently consisting only of a brief table of contents or a mere list of the principal documents comprised in the record. In such list many important papers, orders, etc., are not indexed at all, and often whole volumes of testimony are referred to only as "Testimony," no index whatever being made of the names of the different witnesses or of the exhibits introduced, depositions taken, etc. Occasionally, records are received that contain no index at all. The complete and accurate indexing by the Clerk of an Appellate Court of all printed records placed before the Court,—*whether or not the record be printed (with or without an index) by the parties themselves, or in the trial court,*—is a feature of the practice under Printing Rule 23 of great importance and value, justified by the experience of many years, and tending to facilitate the work of the Court and of counsel; and experience has shown that the proper and uniform indexing of records is more nearly obtained in having all indexes to the printed records prepared and printed in the Circuit Court of Appeals. Therefore, section 4 of Rule 23, as amended, requiring the Clerk of the Circuit Court of Appeals to index all records is most valuable and should not be disturbed.

V.

SUGGESTIONS CONCERNING THE CASE OF COLT'S ETC. CO. v. N. Y. SPORTING GOODS CO.

The appellant relies largely upon the decision of the Circuit Court of Appeals for the Second Circuit, in Colt's etc. Co. v. N. Y. Sporting Goods Co. etc. (186 Fed. 625), but an examination of that decision discloses the fact that the Court emphatically recognized the importance and necessity of requiring all indexes of the printed records to be printed under the supervision of the Clerk of the Circuit Court of Appeals, and, following the ruling of this Court in Bean v. Patterson, *supra*, required the collection of the fee in question in its entirety, thereby recognizing the fact that the act of February 13, 1911, did not repeal the Table of Fees prescribed by this Court for the clerks of Circuit Courts of Appeals.

In reference to the statement made in the third paragraph of this decision, that: "The only thing which the Clerk does is to prepare or supervise the preparation of the index," attention is invited to the facts, already set forth, and it is submitted, with due respect, that said statement had reference only to the cases then before the Court, and is inapplicable to cases governed by the procedure in force in the Circuit Court of Appeals for the Ninth Circuit.

VI.

THE CASE OF SMITH v. FARBENFABRIKEN CO.

The brief for the appellant closes with a quotation from the decision of the Circuit Court of Appeals for the Sixth Circuit in Smith v. Farbenfabriken etc. Co. (197 Fed. 849). The opinion is very brief; it contains no discussion of the important questions here involved, and is entirely unsupported by authority. Therefore, with due deference, it is submitted that the Court's conclusion that the act of February 13, 1911, repealed by implication the Table of Fees under consideration is not highly persuasive.

VII.

SUGGESTIONS CONCERNING THE INAPPLICABILITY OF ADMIRALTY RULE 52.

The argument of the appellant is devoted principally to an endeavor to show that the fee in question does not accrue in the present cause in admiralty because the apostles were duly prepared and indexed as required by Admiralty Rule 52 of this Court and section 6 of rule 14 of the Circuit Court of Appeals, and that the apostles were duly printed, certified and presented for filing in the Circuit Court of Appeals as required by the act of February 13, 1911; and, therefore, inasmuch as the apostles were duly prepared, indexed, printed, certified and presented for filing *as required by law*, the indexing of the record required by section 4 of rule 23 of the Circuit Court of Appeals was rendered unnecessary, would be a duplication of work already done by others, and that the fee imposed by the clerk's Table of Fees and by section 9 of rule 23, is, therefore, "contrary to common sense and repugnant to a sense of justice."

The appellant's case, therefore, depends almost entirely on the position stated on page 10 of her brief, as follows:

> "The record on appeal then which is required to be printed under the act of February 13, 1911, in admiralty causes, is a record prescribed by Admiralty Rule 52, and must include an index thereto."

It is respectfully submitted that this interesting argument of the appellant is fallacious, and the position taken is untenable, for the following reasons:

Admiralty Rule 52 was originally adopted by this Court January 22, 1856, and was then numbered Rule 53. At that time appeals from all final judgments in the District Court where the value in dispute, exclusive of costs, exceeded fifty dollars, were to the Circuit Court as then constituted; and from all judgments in the Circuit Court where the matter in dispute, exclusive of costs, exceeded two thousand dollars, appeals lay to the Supreme Court of the United States. In the Supreme Court the record was required to be printed under Rule 10 of that Court, *but the record on appeal to the*

Circuit Court was not required to be printed, and was not printed, except in very rare instances, and then only by special order of the Court. Admiralty Rule 52 of the Supreme Court provided, therefore, for the preparation of a written record, and not a *printed* record, as the rule itself indicated, and accordingly *the index* that the Clerk of the District Court was required to make thereto was an index to the *written* record.

However, Admiralty Rule 52 is inapplicable because it was entirely superseded by the Rules in Admiralty that were adopted by the Circuit Court of Appeals on May 21, 1900, *and went into effect on the first Monday of October,* 1900, *and have remained in force ever since.*

It is true that when the general rules of the Circuit Court of Appeals were adopted, section 6 of rule 14 provided that:

> "The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty Rule No. 52 of the Supreme Court,"

but it is respectfully submitted that the latter section, as well as Admiralty Rule 52, were, in so far as the Ninth Circuit is concerned, superseded by the Rules in Admiralty adopted in 1900 and above referred to. Under section 2 of the act of March 3, 1891, the Circuit Court of Appeals undoubtedly had the power to adopt its own admiralty rules, and, in so far as the Ninth Circuit is concerned, and ever since the first Monday of October, 1900, and at present, those rules (together with certain pertinent portions of the general rules) govern the appellate procedure in admiralty. *The Rules in Admiralty of the Circuit Court of Appeals contain no provision whatever requiring the Clerk of the District Court to index apostles on appeal to the Circuit Court of Appeals, and, as Admiralty Rule 52 of this Court was inapplicable, the index that was prepared and printed in the District Court in the present case was not required by law.*

As shown above, Admiralty Rule 52 being inapplicable, the provisions of section 4 of General Printing Rule 23 of the Circuit Court of Appeals providing that:

> "In all cases, including cases in which the record may have been printed under the act of Congress approved

February 13, 1911, or otherwise, the Clerk of this court shall index the printed record,"

apply to all classes of cases, *including admiralty causes,* Moreover, to avoid misunderstanding on the subject the Circuit Court of Appeals on May 22, 1912, in view of its special admiralty rules, abolished section 6 of rule 14 of its General Rules relied upon by appellant here.

In conclusion, the Clerk of the Circuit Court of Appeals most respectfully submits that a careful consideration of the act of February 13, 1911, and of the statutes and decisions relating thereto, as well as of the rules and practice in force in the Ninth Circuit, shows conclusively that:

(1) The Circuit Court of Appeals for the Ninth Circuit is not authorized to hear and determine the present cause on the unfiled printed copies of the apostles and to dispense with the payment of the fee in question; and that

(2) The first section of the act of Congress of February 13, 1911, does not, by implication, set aside the Table of Fees and Costs established by this Court for the Circuit Courts of Appeals, and leads irresistibly to the conclusion that both of the questions certified must be answered in the negative.

Most respectfully submitted,

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.